Supreme Court of the United States

OCTOBER TERM 1942

No. 300

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,

Petitioners,

against

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
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Preliminary Statement

The grounds urged for the granting of this writ relate merely to rulings on two points of evidence and to a ruling on a request to charge in a case where the petitioners conceded in their brief in the Circuit Court of Appeals that the evidence presented a jury question which the trial judge properly refused to disturb on the motion to set aside the verdict.

The case does not present any question which this Court is accustomed to review by certiorari. No difference of decisions between circuits on any material point is involved, and the decision of the Circuit Court of Appeals

is not in conflict with the decisions of this Court insofar as they have a bearing upon the question here presented. Neither are there questions of large public importance.

Pleadings and Facts

In its opinion the Circuit Court of Appeals summarized the facts and pleadings as follows (R. 514):

> "Appellants, as trustees in reorganization of the New York, New Haven and Hartford Railroad Company, appeal from a judgment, entered upon a jury verdict, awarding $25,077.35 to the plaintiff in his individual capacity and $9,000.00 to him as administrator of his wife's estate. The action grew out of an accident which occurred at a grade crossing of the appellant railroad in West Stockbridge, Mass. On December 25, 1940, at about 6:15 P. M., the plaintiff was driving a Ford Coupe, with his wife as a passenger, at this crossing, when the car was struck by a locomotive engine, causing severe and permanent injuries to the plaintiff and the death of his wife. The complaint alleged that the railroad was negligent in failing to ring a bell or blow a whistle while approaching the crossing, and in failing to have a proper headlight; in view of the verdict, no issue is raised as to appellants' liability if the rulings on evidence and the charge to the jury were proper, and the alleged errors pertain exclusively to these matters."

The plaintiff in the first cause of action seeks damages for personal injuries to himself, under the General Laws of Massachusetts, Chapter 160, §§ 138 and 140, and Chapter 231, § 85 (R. 4-9, Appendix, pp. 17, 18), and in the second cause of action seeks damages under the common law (R. 9-12). The plaintiff, as administrator, in the third cause of action seeks damages for the death of his wife, under the same statutes and Chapter 229, § 3 (R. 12-15, Appendix, p. 18), and in the fourth cause of action seeks damages for her death under the common law (R. 15). The

allegations as to the statutes are admitted in the answer (R. 20, 23).

As a third separate answer and defense, the defendants allege Chapter 160, § 232 of the Massachusetts Laws (R. 30, 31, Appendix, p. 17).

The issues as to negligence submitted by the court to the jury were whether a bell was rung, whether a whistle was blown and whether the train had a light on its front (R. 426).

After the verdict was rendered, the court denied all motions made by the defendants' counsel at the close of plaintiff's case and at the close of the entire case, upon which decision had been reserved, and also denied all motions to set aside the verdict (R. 442).

The Errors Claimed

1. A statement of defendants' deceased engineer (Defts.' Ex. J for Iden., R. 496-499) was offered in evidence under 28 U. S. C. A., § 695, and upon objection was excluded (R. 421). The Circuit Court of Appeals sustained this ruling (R. 535, 536) and error is claimed.

2. On cross-examination of plaintiff's witness, Laurence Bona, defendants' counsel called for a statement of the witness given to plaintiff's attorneys (R. 125). Upon being advised by the trial judge that if he looked at the statement the opposing side might offer it in evidence, counsel announced he did not want the "pesky" thing (R. 125, 253). The Circuit Court of Appeals refused to reverse on this ruling and error is claimed (R. 550).

3. The court charged that defendants had the burden of proving contributory negligence (R. 428), and defendants excepted (R. 437). They then requested the court to charge (16th request, R. 488): "In the personal injury action plaintiff has the burden of proving freedom from contributory negligence." To the refusal to grant this

request, defendants excepted (R. 437). They now claim error in the sustaining of these rulings by the Circuit Court of Appeals.

Petitioners assert that these rulings on the evidence and the charge present questions upon which this Court should grant to them a writ of certiorari.

ARGUMENT

POINT I

The exclusion of the statement of the deceased engineer was not erroneous and raises no important question of federal law which has not been determined by this Court and which is in conflict with the decisions of this Court insofar as they have a bearing on the question here presented.

The defendants offered in evidence (R. 421) a statement of the engineer who was driving the engine at the time of the accident (Defendants' Exhibit J for Ident., R. 496-499) and who had since died (R. 271). The engineer was riding on the left side of the engine as it was moving and did not see the accident or know of it until the fireman called it to his attention (R. 333). The statement, taken two days after the accident in question and answer form, represents a stenographic record of an interview between the engineer and an assistant superintendent of the railroad, at which were present two other employees of the railroad and a Mr. Christie of the Massachusetts Public Service Commission (R. 496, 514). The offer of this statement was in the following language (R. 421):

> "Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

> The statement was signed by the engineer, and is marked for identification as Exhibit J, under Section 695 U. S. C. A. 28.
>
> The defendants offer the proof also that this statement was signed in the regular course of any (sic) business and that it was the regular course of such business to make such statement."

The statement is headed "Investigation in connection with engine 438 being struck by an automobile while passing over Elkey-Buckley Public Highway Crossing" (R. 496). This heading clearly indicates that this was an "investigation" involving the conduct of the engineer himself.

In sustaining the exclusion of this statement Circuit Judge Frank, with whom Circuit Judge Swan concurred, after reviewing at length the common law rule and the history and application of § 695, said (R. 535-536):

> "With all that in mind, we construe the statute as not making admissible the engineer's statement which, by its very nature, is dripping with motivations to misrepresent. Accordingly, *we decide this and no more:* The statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the memorandum or report knows at the time of making if that he is very likely, in a probable lawsuit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability."

And again (R. 541):

> "But our decision here raises no such problem; we are not leaving the extent of the disqualifying motive under § 695 at large or entrusting discretion with respect to it to the trial judge; for, as we have said, we decide merely this: The statute does not render ad-

missible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents."

In the petition, certain phrases, clauses and sentences of the majority opinion are referred to. These do not completely nor adequately reflect the logic and reasoning leading to the conclusion above quoted.

The majority opinion clearly shows that the statement would be excluded under the common law rule (R. 515-522), citing cases from various jurisdictions, including its own prior holdings (R. 518) and quoting from Wigmore (R. 520). From this analysis of the common law rule, the majority concluded (R. 521):

"It is clear, then, that the words 'regular course of business', as used in the decisions, have always included the concept that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supplying the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not bring such reports within the meaning of the words of art, 'regular course of business'. That the defendant railroad here had a regulation requiring its employees, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigation, did not suffice to include such reports within the 'regular course of business', as those words have always been understood by lawyers and judges. For the 'regularity' which justifies the exception is the kind which tends to 'counteract the possible temptation to mis-statements', as Wigmore has noted.

> It follows that the phrase 'regular course of business' never covered a regular practice of making records with the purpose of supplying evidence in a highly probable lawsuit, when those records are made by persons with every 'possible temptation to mis-statements'. We have found no case holding or even suggesting that, absent a statute changing the common law rule, such a statement as the engineer's is admissible, loaded as it is with motives to misrepresent the facts."

The majority opinion then considers the question of admissibility of the statement under § 695 (R. 522-545). Commenting on the language of this section, Judge Frank says (R. 523):

> "The words, 'regular course of business', twice employed in the legislation, are not colloquial words but are words of art, with a long history, and, as we have observed, often theretofore judicially interpreted. Consequently, they should be given that settled meaning when incorporated in a statute, absent a contrary legislative intention clearly expressed in the statute or in its legislative history."

After referring to a number of decisions, some from this Court, that words often obtain a fixed meaning through judicial interpretation, Judge Frank says (R. 525):

> "And so with 'regular course of business' as applied to records or memoranda in an evidence statute. To a layman, the words might seem to mean any record or paper prepared by an employee in accordance with a rule established in that business by his employer. But according to the jargon of lawyers and judges those words, in discussions of evidence, have always meant writings made in such a way as to afford some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent."

While it is true that when there is no ambiguity, there is no room for construction of a statute, it is also true that

words must be given the meaning acquired by usage and interpretation and that all statutes must be construed to carry out the intent of the law enacting body.

This Court, in *Ozawa* v. *United States*, 260 U. S. 178, 194, said:

> "If is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Reports of legislative committees may be consulted as an aid to ascertain the intent of Congress in enacting a statute.

> *McLean* v. *United States*, 226 U. S. 374.
> *Church of the Holy Trinity* v. *United States*, 143 U. S. 457.

Judge Frank then refers to the "Model Act" (from which § 695 is copied) sponsored by the Legal Research Committee of the Commonwealth Fund and to Section 374a of the Civil Practice Act of New York, enacted in 1928, and various decisions thereunder (R. 525-529), and says (R. 529):

> "No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of 'regular course of business'. *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning.* If that had been their intention, they would surely have said so, either in the language of the Act

> itself or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in 'the regular course of business'. Nor is there anything in any subsequent comments of any members of that committee showing that they had any such intention."

In 1936 Congress adopted the Model Act in enacting § 695. Judge Frank quotes from Attorney General Cumming's letter and memorandum, submitting a draft of the bill to Congress (R. 565-570) which showed the limited objective of the act and he then reviews the decisions arising thereafter in the Federal Courts (R. 536, 537). All of these decisions construing § 695 are consistent and based upon the same principle (R. 539):

> "There, as in all our other decisions construing and applying § 695, we were careful to ascertain that the 'regularity' in the 'regular course of business' was such as to afford some 'reasonable guaranty of accuracy' or something to show an absence of a vigorous motive to misstate.
>
> We are, then, in no way to be understood as intiating restrictive interpretations of the statute or as retracting or modifying the favorable constructions we have given it in our previous decisions. Our decision here is no less liberal than the decisions of other state or federal courts interpreting the Model Act. For, to repeat, we know of no case in any court holding, or even intimating, that such an obviously motivated record as that here before us is admissible under that Act."

Petitioners suggest (Petition p. 9) that a question of Federal law, more important even than that which served as a basis for the granting of a writ in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941), involving Federal Rules of Civil Procedure 35 and 37, is here presented. In that case, how-

ever, the incarceration of a plaintiff for violation of a contempt order for failing to submit to a physical examination was involved and such a question was vital to the rights of a citizen under the Constitution. More analogous is the refusal of this Court to grant a writ of certiorari in *Ulm* v. *Moore-McCormack Lines, Inc.*, 115 F. (2d) 492, rehearing denied 117 F. (2d) 222, and certiorari denied 313 U. S. 567. In that case the question presented was the construction and application of § 695 as interpreted by the Circuit Court of Appeals for the Second Circuit.

The holding of the Circuit Court of Appeals as quoted above (p. 5) limits this decision to the facts presented herein and is in accord with all prior decisions not only of the Circuit Court of Appeals for the Second Circuit, but in other jurisdictions, and with the decisions of this Court insofar as they are applicable to the question involved.

While it is true there is a dissenting opinion by Circuit Judge Clark, suggesting that the majority opinion is opposed to the intent of the statute and contrary to the prior decisions of that Court, it is submitted that Judge Clark's criticism of the conclusion in the majority opinion is not justified and that his holding that the statement was admissible gives to § 695 so broad a construction that a railroad could present its defense by introducing statements taken in what it calls regular course of that business without the necessity of calling any witnesses. Such an application of the statute, of course, could not have been intended.

This decision, therefore, presents no question of Federal law of sufficient importance to warrant certiorari.

POINT II

The decision of the Circuit Court of Appeals that it was harmless error for the trial court to hold that, upon demand for and inspection by defendants' attorney of a statement made by plaintiff's witness, it was admissible in evidence, presents no important question of federal law which has not been, but should be, determined by this Court.

When defendants' counsel, on cross-examination of plaintiff's witness Laurence Bona, demanded the production of the statement given by the witness to plaintiff's attorney, the court advised him of the rule in the district that such production and inspection would permit the plaintiff to offer the statement in evidence (R. 125), and later state: "That is the rule followed by the judges in this district" (R. 253).

This rule was enunciated in 1891 by Judge Lacombe in *Edison Electric Light Co.* v. *United States Electric Lighting Co.*, 45 Fed. 55 (C. C. A. 2), and followed in *McCarthy* v. *Palmer*, 29 Fed. Supp. 585 (E. D. N. Y.), affirmed on other grounds in 113 F. (2d) 721.

The Circuit Court of Appeals disapproves of this rule in the following language (R. 549):

> "At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it."

The majority, however, refused to reverse for the reasons given as follows (R. 550):

"Nevertheless, we do not reverse here for error in the trial judge's ruling, for these reasons: (1) the written statement of the witness could, at most, have been used for purposes of impeachment. As that statement is not in the record before us, it is impossible for us to know whether it contained any remarks contradicting the witness' testimony at the trial so that it would have served for impeaching purposes. If counsel wanted to assign error, he should have asked the trial judge to certify that statement to us, as part of the record on appeal. Since the statement is not before us, the result, if we were to reverse, would be to send the case back on the mere chance that the statement may contain matter which would have led to such an impeachment of the witness as materially to affect the jury's verdict. A verdict should not be so lightly disturbed. (2) Moreover, we cannot say that the trial judge or appellants' counsel was unreasonable in relying on Judge Lacombe's decision in the *Edison Electric* case. (Certainly appellants' counsel was not surprised, since it happens that he had, on behalf of the same clients he represents here, successfully persuaded the judge to render the decision in *McCarthy* v. *Palmer*, *supra*). In the circumstances, it would be unwise to overturn a verdict because of the erroneous ruling on this point."

In the dissenting opinion, Circuit Judge Clark does not consider whether the error was reversible or harmless (R. 561).

Although the majority opinion indicates that the trial judge should have dealt with the request as if it had arisen under F. R. C. P. Rule 26(b), and the petitioners claim that such statement by the Court is ground for the granting of this writ, the only question presented was whether plaintiff's counsel could offer the paper in evidence if defendants' counsel looked at it. The Circuit Court of Appeals having rejected the old rule (the only question involved), the fact that it referred to other rules of procedure in its opinion does not present a question of Federal law which should now be reviewed by this Court.

POINT III

The decision of the Circuit Court of Appeals that the burden of proving contributory negligence was on the defendants, is not in conflict with decisions in the First and Eighth Circuits, is not erroneous, and does not present an important question of federal law which should be determined by this Court.

In sustaining the rulings of the trial court, and in holding that the burden of proof of contributory negligence was on the defendants, the court was unanimous. It said (R. 552):

> "The only remaining issue is whether the judge was correct in charging that the burden of proving contributory negligence was on the defendant. In so charging, he was following Federal Rule of Civil Procedure 8(c). It is argued that we should disregard that Rule because burden of proof is a matter of 'substance', and hence cannot be altered by court rule. There is no necessity here of considering the argument. For if we were to reject the Rule, we would then turn to the decisions of the New York courts including those relating to conflict of laws. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon* v. *Stentor*, 313 U. S. 487. While, with respect to intra-mural transactions, New York courts hold that the burden of proof is on the plaintiff, in a case such as this, they would apply, as a matter of conflict of laws; the Massachusetts law. *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127. And it happens that the Massachusetts rule coincides with Rule 8(c). See General Laws of Massachusetts, § 85, c. 231."

It is difficult to understand the petitioner's position regarding this part of the decision. On page 14 the petition reads:

> "The decision of the Circuit Court of Appeals is to the effect that because of Rule 8 (c) (set out in Appendix, *infra*, pp. 19-20), or because of the decisions of the

> New York courts, including those relating to conflict of laws, the trial court was correct in charging that the burden of proving contributory negligence was on the defendants (R. 552)."

The petition then continues:

> "Defendants urge that Rule 8 (c) has no application as it relates to pleading and not to proof, and as federal courts treat burden of proof as a matter of substance which cannot be altered by court rule."

But on page 15 the petition reads:

> "The escape method of treatment in the majority opinion (admitted in note 65, R. 552) is not sound. This case involves consideration both of Rule 8 (c) and of New York law. To reach what we contend was a wrong result, the opinion refused to pass upon Rule 8 (c) and misinterprets the New York law."

And later on the same page:

> "In not definitely holding that the trial court should have been governed by the conflict of laws rule of New York, which treats burden of proof as procedural, the decision is again in conflict with Sampson v. Channel, supra."

Whether the petitioners claim the court applied Rule 8(c) or did not apply it, is uncertain. It would seem, however, from a reading of the opinion that the Circuit Court of Appeals held the charge correct upon the ground that the New York courts in a case of this character, would apply as a matter of conflict of law, the Massachusetts law (*Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127). It happened that the Massachusetts law coincided with Rule 8(c) (R. 552).

This holding is not in conflict with *Sampson* v. *Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), certiorari denied 310 U. S. 650, nor with *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). In the *Sampson* case the court applied the conflict of laws rule of Massachusetts (as con-

ceded in the petition, p. 15). In the *Fort Dodge Hotel Co.* case, the court applied the law of Iowa, where the accident occurred and where the action was tried. The same principle of conflict of law was followed in *Boyle* v. *Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942).

In *Sampson* v. *Channell*, 110 F. (2d) 754, the court after reviewing the principle of conflict of laws in sister states, said (p. 760):

> "There is no doubt that in this situation the state courts of New York would have applied the same rule of conflict of laws, and would have looked to the lex loci delicti. Fitzpatrick v. International Ry. Co., 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801."

The holdings in *Wright* v. *Palmison*, 237 App. Div. 22, and *Clark* v. *Harnischfeger*, 238 App. Div. 493, in no way relate to or affect the decision in the *Fitzpatrick* case.

The petition states the question involved as follows (p. 17):

> "We have stated the main question to be, whether in diversity of citizenship cases the federal courts must follow the conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c)."

That question was unanimously determined by the Circuit Court of Appeals in holding under the conflict of law rule of New York the Massachusetts law applied. This holding is in accord with the decisions of this Court that in diversity of citizenship cases the conflict of law rule in the state where the court sits shall control.

> *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.
> *Klaxon* v. *Stentor Manufacturing Co.*, 313 U. S. 487.
> *Griffin* v. *McCoach*, 313 U. S. 498.

Petitioners, however, seek to introduce subsidiary questions (Petition, p. 17) which were not determined in the

court below and which were not necessary for determination in reaching the conclusion on the issues of burden of proof.

We submit, however, that inasmuch as there is now no conflict between the circuits as to burden of proof of contributory negligence in cases arising because of diversity of citizenship, there is no occasion for this Court to consider this question on this record, simply because the Circuit Court of Appeals failed to express an opinion as to Rule 8 (c).

CONCLUSION

It is respectfully submitted that the issuance of a writ of certiorari should be denied.

WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
of Counsel.

APPENDIX

Additional Statutes Involved

Chapter 160, Section 138 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"Every railroad corporation shall cause a bell of at least 35 lbs. in weight, and a steam whistle to be placed on each locomotive engine passing upon its railroad; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level with any public way or travelled place over which a signboard is required to be maintained as provided in sections 140 and 141; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the department by the following section."

Chapter 160, Section 232 of the General Laws of Massachusetts, Tercentenary Edition 1932, reads as follows:

"If a person is injured in his person or property by collision with the engines or cars of rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section three of chapter two hundred and twenty-nine, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in said section three, unless it is shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

Chapter 229, Section 3 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased and distributed as provided in section one."

Chapter 231, Section 85 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."